No. 14-1504

IN THE

Supreme Court of the United States

ROBERT J. WITTMAN, BOB GOODLATTE, RANDY J. FORBES, MORGAN GRIFFITH, SCOTT RIGELL, ROBERT HURT, DAVID BRAT, BARBARA COMSTOCK, ERIC CANTOR & FRANK WOLF,

Appellants,

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

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STATEMENT

Virginia's Third Congressional District ("CD3") is no stranger to this Court. The District Court has twice held that CD3 is an unconstitutional racial gerrymander, and Appellants have twice appealed that ruling here. Both times they have done so alone, without the support of the State Defendants who defended CD3 below. In light of the State Defendants' abandonment of the appeal, this Court lacks jurisdiction. And in light of the overwhelming evidence in support of the District Court's decision, this appeal lacks merit.

* * *

CD3's racial purpose manifests in its appearance. It is a bizarrely shaped district that starts north of Richmond and slides down the northern shore of the James River, ending abruptly at the James City border. It jumps over James City and lands in a horseshoe shape in Newport News. It leaps over southern and eastern Newport News and stops in Hampton. CD3 then starts anew on the river's southern shore, darting west to swallow Petersburg and then sliding east through Surry. It bypasses the Isle of Wright, covers Portsmouth, and runs up into Norfolk, tearing CD2 in two on either side of Norfolk. Joint Appendix ("JA") 413-17. As currently constituted, CD3 closely resembles the 1991 district deemed an unconstitutional racial gerrymander in *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va.), *aff'd*, 521 U.S. 1113 (1997). In a description that applies today, that court described CD3's predecessor as "a grasping claw." 952 F. Supp. at 1147. Then, as now, "[e]very one of the [district's] fingers which reaches . . . into the divided cities, uses . . . barren stretches of river, or other dubious connectors . . . in an effort to reach

theblack populations which it excises from the various cities." *Id.*; JA 413-17.

The Plan's architect Delegate Bill Janis candidly admitted his motives in drawing CD3. He repeatedly and unequivocally stated that achieving a numerical racial target in CD3 in attempted compliance with Section 5 of the Voting Rights Act ("VRA") was his "primary focus," of "paramount concern[]," and considered "nonnegotiable." JA 357, 370. Delegate Janis categorically denied that the peculiarities of CD3 resulted from a partisan purpose, stating without qualification: "I haven't looked at the partisan performance. It was not one of the factors that I considered in the drawing of the district." JA 456.

But Delegate Janis's race-based redistricting had no grounding in either the VRA or the history of CD3. Since 1991, CD3 has been represented by Congressman Bobby Scott, who has consistently won reelection by comfortable margins. Nevertheless, in the 2012 redistricting, the General Assembly increased the black voting age population (BVAP) in CD3 to satisfy a 55% BVAP threshold, creating a district in which Congressman Scott won his last election with **81.3%** of the vote. Jurisdictional Statement Appendix ("J.S. App.") 40a. The record showed that the General Assembly achieved its target racial composition by moving high-density BVAP areas into CD3, while excluding lower-density BVAP areas. *See* JA 206-15.

In October 2013, three Virginia voters residing in CD3 filed this action challenging CD3 as a racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment. Compl. ¶ 1. Appellants, current and former Republican Congressional representatives, intervened as Defendants. The

case went to trial in May 2014. The State Defendants[1] and Appellants presented a single witness in defense of the Plan—Appellants' expert, John Morgan. On October 7, 2014, the District Court ruled that CD3 was an unconstitutional racial gerrymander. Appellants appealed. The State Defendants did not.

This Court made no substantive rulings with respect to Appellants' first appeal. Rather, after deciding *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015), the Court remanded this case for further consideration.

Upon remand, the District Court reaffirmed its prior decision, explaining why *Alabama* further bolstered its conclusion that CD3 was an unconstitutional racial gerrymander. J.S. App. 12a-13a, 39a-40a. Again, Appellants appealed. Again, the State Defendants did not.

While this appeal was pending, remedial proceedings below continued. The District Court appointed a special master, who considered draft plans submitted by parties and non-parties. On November 16, 2016, he issued a final report proposing two remedial plans and urging rejection of Appellants' proposed plans because they perpetuated, rather than remedied, the racial gerrymander of CD3. *See* Application for Stay of Remedial Plan (Jan. 12, 2016), Appendix C. On January 7, 2016, the District Court adopted one of the special master's proposals. *Id.*, Appendix B ("Remedy Order").

Five days later, Appellants filed an application to stay the remedial plan, which, as of the filing of this

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[1] Defendants are the Chair, Vice-Chair, and Secretary of the State Board of Elections, sued in their official capacity.

brief, remains pending. Both Appellees and the State Defendants opposed the application.

SUMMARY OF ARGUMENT

Appellants lack standing to pursue this appeal. They have no legal responsibility for drawing or enforcing the 2012 redistricting plan, nor do they live in or represent CD3, the only district whose constitutionality is at issue. Instead, their only claim to standing is that a remedial plan following from the District Court's judgment *might* negatively impact the chances of *some* Appellants *if* they choose to run for reelection in their current districts and *if* they are successful in defeating primary challengers. But the Court has never recognized a legally cognizable interest in an incumbent congressman's desire to maintain the precise partisan vote share that got him elected. Indeed, the remedial plan flowing from the District Court's judgment is merely one of a host of electoral circumstances that will decide Appellants' fate at the ballot box.

Even if the Court did have jurisdiction, there is no basis in law or fact to disturb the District Court's decision. The direct evidence of racial predominance is overwhelming. The General Assembly's official redistricting criteria listed VRA compliance as the most important factor other than population equality. JA 97. Significantly, as in *Alabama*, the *means* chosen by the General Assembly to comply with its overriding goal was a "mechanical racial target[]." 135 S. Ct. at 1267.

The plan's sole mapdrawer repeatedly confirmed that racial considerations predominated in drawing CD3. Delegate Janis mistakenly believed that the non-retrogression mandate prohibited *any* decrease in

BVAP percentages below the benchmark level, *see* JA 357, and he adopted a 55% BVAP threshold in CD3 to ensure preclearance under Section 5, *see* JA 398. He drew CD3 with this "mechanically numerical" understanding of Section 5, *Alabama*, 135 S. Ct. at 1272

The circumstantial evidence confirms Delegate Janis's express admissions that race predominated. CD3 is the least compact district in the Commonwealth, tenuously uses water contiguity to string together disparate black communities along the James River, and, as a result, splits more localities than any other district. To achieve its racial goals, the General Assembly moved over 180,000 people between CD3 and adjoining districts to achieve an overall population increase of only 63,976 people, disproportionately moving black voters into and white voters out of CD3.

Appellants can hardly dispute this evidence, let alone establish that the District Court's factual findings were "clearly erroneous." *Miller v. Johnson*, 515 U.S. 900, 917 (1995). They attempt to conjure a legal error out of their disagreement with the District Court's factual findings, arguing that the court "failed to apply" *Alabama*. Appellants' Br. 25. This not only mischaracterizes the District Court's decision, it ignores the dissent below, which had no quarrel with the majority's legal analysis, only its resolution of factual disputes. *See* J.S. App. 45a (agreeing that the majority "applied the proper analytic framework as specified by *Alabama*").

Appellants' constant refrain on appeal is that politics, and not race, drove CD3. To believe Appellants' revisionist history, however, this Court would have to find that Delegate Janis was lying when

he announced that racial goals were his paramount concern, that all other factors took a backseat to achieving a precise racial composition in CD3, and that he did not consider the political performance of the districts. According to Appellants, politicians prioritize politics no matter what they say to the contrary. This view not only contradicts the legislative record in this case, it invites legislatures to say one thing and do another to avoid judicial scrutiny.

Indeed, Appellants unabashedly contend that Delegate Janis's use of a numerical racial target is irrelevant to the predominance inquiry where, in so doing, he achieved his purported partisan goals. But far from disproving the District Court's findings, Appellants' suggestion that the General Assembly used race as proxy for political objectives only *confirms* that race predominated. Appellants' Machiavellian approach to the use of race for political ends openly flouts this Court's precedent. *See Bush v. Vera*, 517 U.S. 952, 968 (1996).

Ultimately, Appellants' argument rests on a single case: *Easley v. Cromartie*, 532 U.S. 234 (2001) ("*Cromartie II*"). Appellants insist that, under *Cromartie II*, Appellees could not advance a *Shaw* claim without an alternative plan that achieves the precise partisan objectives Appellants project onto Delegate Janis. But *Cromartie II* hardly rewrites the threshold showing of racial predominance for all racial gerrymandering plaintiffs. In that case, the direct evidence evinced an avowedly partisan purpose behind the plan and plaintiffs advanced a largely circumstantial case to prove otherwise. In this case, the direct evidence reveals an avowedly *racial purpose* behind CD3, which is bolstered by circumstantial evidence of the district's shape and demographics.

Contrary to Appellants' view, there remains more than one way to demonstrate that race predominated over political considerations, including when the sole mapdrawer publicly declares that race predominated over political considerations.

Appellants' argument that the District Court misapplied the narrow tailoring requirement is equally flawed. Appellants cannot explain away the General Assembly's failure to engage in any analysis whatsoever to determine whether the VRA compelled its race-based approach. The General Assembly made the same mistake as did the legislature in *Alabama*. It "asked the wrong question" by focusing on how it could it draw CD3 to comply with an arbitrary racial threshold. *Alabama*, 135 S. Ct. at 1274. It failed to ask the *right* question: "To what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?" *Id.*

In the end, it seems that even Appellants recognize their argument on racial predominance is all but doomed by *Alabama*, which is why they studiously avoid their own arguments and evidence below. Based on their flawed understanding of the law at the outset of this case, Appellants conceded that "compliance with Section 5 was [the legislature's] predominant purpose or compelling interest underlying District 3's racial composition." J.S. App. 19a. They now disavow those words as "*post hoc* litigation statements [made] by strangers to the redistricting process." Appellants' Br. 46 n.4. Appellants affirmatively offered testimony below supporting and extolling the General Assembly's use of a 55% BVAP threshold. Dkt. No. 85 (Int.-Def. Tr. Br. 25-26). They now contend there was no such thing. *Id.* at 44.

Appellants' ever-evolving view of the factual record is telling. The record, in any event, speaks for itself—and the General Assembly's predominant and unjustified use of race in drawing CD3 is resoundingly clear.

I. APPELLANTS LACK STANDING

The Court lacks jurisdiction to hear this appeal because Appellants lack standing to pursue it. None of the Appellants resides in CD3, represents CD3, or is responsible for drawing or conducting elections in CD3. Rather, their claim to standing rests entirely on speculative electoral prospects in surrounding districts. The Court should reject Appellants' invitation to expand the scope of Article III by opening its doors to political candidates seeking to attain just the right number of just the "right" kind of voters to secure electoral victory.

Article III of the Constitution limits the jurisdiction of federal courts to matters that present "cases" or "controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). This "essential limit" to the federal judiciary's power requires more than "the party invoking the power of the court hav[ing] a keen interest in the issue." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013). Rather, all litigants must be able to demonstrate (1) they have suffered "a concrete and particularized injury," (2) that "is fairly traceable to the challenged conduct," and (3) "is likely to be redressed by a favorable judicial decision." *Id.* at 2661 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)); *see also id.* ("The presence of a disagreement, however sharp and acrimonious . . . , is insufficient by itself to meet Art. III's requirements.") (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986)).

A litigant cannot satisfy Article III by positing a theoretical harm that might conceivably follow from adjudication of a matter. It must show an "injury in fact," by which is meant "an invasion of *a legally protected interest*" that is "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)) (emphasis added). Moreover, "there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action . . . and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Id.* at 560 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)).

Article III's case and controversy requirements apply to both plaintiffs and defendants and "persist throughout all stages of litigation." *Hollingsworth*, 133 S. Ct. at 2661 (citing *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013)); *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) ("Standing to sue or *defend* is an aspect of the case-or-controversy requirement.") (emphasis added).

An intervenor need not necessarily establish independent Article III standing if there is another party with standing on the same side of the case.[2] But if the party with standing chooses not to appeal, there is no longer any case or controversy. *See Diamond*, 476 U.S. at 63-64 ("By not appealing the judgment below, the State indicated its acceptance of that decision . . . .

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[2] The U.S. Courts of Appeal are divided as to whether intervenors must independently establish Article III standing to participate in district court proceedings, and the Court has thus far declined to reach that question. *See Diamond*, 476 U.S. at 68-69 & n.21 (1986). That question is not presented by this appeal.

The State's failure to invoke our jurisdiction leaves the Court without a 'case' or 'controversy' between appellees and the State[.]"). Thus, where, as here, an intervenor appeals alone, it must demonstrate that it has standing. *Hollingsworth*, 133 S. Ct. at 2659; *Arizonans*, 520 U.S. at 65 (an intervening party "cannot step into the shoes of the original party" unless the intervening party independently "fulfills the requirements of Article III"); *see also Didrickson v. U.S. Dep't of Interior*, 982 F.2d 1332, 1338 (9th Cir. 1992) ("An interest strong enough to permit intervention is not necessarily a sufficient basis to pursue an appeal abandoned by the other parties.").

Appellants cannot demonstrate that here. None of the Appellants have legal authority for redistricting or the conduct of Virginia elections—those jobs belong to the General Assembly (which has not intervened) and the Board of Elections (which has moved this Court to *affirm* the decision below). Thus, the District Court's decision has not caused Appellants any "direct injury," because it "ha[s] not ordered [Appellants] to do or refrain from doing anything." *Hollingsworth*, 133 S. Ct. at 2662.

Appellants instead contend that they collectively have standing because implementation of the District Court's liability judgment will—by curing the unconstitutional racial gerrymander of CD3—require "alterations to their districts that place at least one Appellant in a majority-Democratic district and, thus, harm his re-election chances and interests as a Republican voter." Appellants' Br. 57 As explained below, this theory of injury is neither "concrete" nor "trace[able]" to the District Court's judgment, *Lujan*, 504 U.S. at 560, as Appellants' electoral prospects

remain contingent upon a host of ever-shifting circumstances.

A. Only District-Specific Parties Have Standing to Advance or Defend District-Specific Claims

In a racial gerrymandering case, standing requires a "district-specific" and "personal" injury. *Alabama*, 135 S. Ct. at 1265. While the harms that flow from a racial gerrymander "directly threaten a voter who lives in the *district* attacked, . . . they do not so keenly threaten a voter who lives elsewhere in the State," and therefore "the latter voter normally lacks standing to pursue a racial gerrymandering claim." *Id.*; *see also United States v. Hays*, 515 U.S. 737, 739 (1995) (voters who "do not live in the district that is the primary focus" in a racial gerrymandering case lack standing). There is no defensible basis for a rule that provides that, while voters *challenging* a racial gerrymander must live in the district being challenged, politicians *defending* a racial gerrymander may live anywhere in the Commonwealth.

The district court in *Johnson v. Mortham*, 915 F. Supp. 1529, 1537-38 (N.D. Fla. 1995), recognized as much, holding that congressional representatives residing outside the challenged district had no standing to intervene to defend a racial gerrymandering challenge because—just like a voter who resides in another district—they have "no more than a generalized interest in [the] litigation, since . . . the possibility of a remedy that would impair their interests in their congressional seat is no more than speculative." The *Johnson* court specifically considered the argument that redrawing the challenged district would likely affect surrounding districts but

"[n]evertheless" held that proposed intervenors did not have standing. *Id.* at 1538.

Appellants cannot draw any meaningful distinction between the voter who lives outside CD3 and the Congressperson who represents another district. Both may be affected by, but are bystanders to, the race-based redistricting of CD3. Indeed, it would be a perversion of this Court's racial gerrymandering jurisprudence to hold that while voters lack standing to challenge the *packing* of black voters in an adjacent district, their representative has standing to challenge the *dispersion* of black voters from that same adjacent district, *see* Appellants' Br. 57 (protesting the "shift[ing] [of] black . . . voters" into one or more of Appellants' districts). Simply put, Appellants are wrong to suggest that the standing restraints that apply to ordinary voters in racial gerrymandering claims do not apply to members of Congress.[3]

Their suggestion that "Republican voters" are exempt from this requirement is all the more galling. This assertion is indistinguishable from an argument that any voter in the Commonwealth has standing to challenge or defend CD3 as a racial gerrymander. Republican and Democratic voters alike may assert an interest in maintaining the partisan balance of their districts in the face of potential changes to a district elsewhere in the Commonwealth. But this is precisely

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[3] As discussed below, Appellants have not articulated a legally cognizable interest on behalf of *any* Congressional representatives to a particular district configuration or demographic composition. But because none of the Appellants reside in CD3, the Court need not decide whether an incumbent who did reside in the allegedly gerrymandered district would have standing to defend it.

the type of "generalized grievance against allegedly illegal governmental conduct" that the Court has found insufficient to meet Article III's standing requirements. *Hays*, 515 U.S. at 743; *see also id.* at 744 ("We . . . reject appellees' position that 'anybody in the State has a claim[.]'").

In short, non-resident Appellants cannot establish that their interest in *preserving* the racial gerrymander of CD3 is any more legally cognizable than that of non-resident voters in *undoing* the racial gerrymander of CD3.

B. Appellants' Standing Theory Is Entirely Speculative

Even if the Court were to find that incumbent Members of Congress are exempt from the established standing rules governing racial gerrymandering claims, Appellants' specific claim to a legally cognizable injury remains both attenuated and unsupported. According to Appellants, the District Court's judgment "harms" at least one Appellant by "shifting black (and overwhelmingly Democratic) voters out of District 3 and into one or more of the surrounding Republican districts, and an equal number of non-black (and far less Democratic) voters into District 3." Appellants' Br. 57-58. Not surprisingly, Appellants fail to cite any cases suggesting that a politician's fear that voters of a certain race or political party may be moved into his district is a legally cognizable injury.

As an initial matter, the remedial plan adopted by the District Court after Appellants filed their merits brief does not retroactively confer standing. Standing must exist "at all stages of review," *Arizonans*, 520 U.S. at 67, including when a litigant first seeks an

audience in federal court, *see, e.g.*, *Clapper v. Amnesty Intern. USA*, 133 S. Ct. 1138, 1157 (2013) ("[W]e assess standing as of the time a suit is filed[.]"); *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) ("[T]he standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed."). Focusing on that snapshot in time enforces Article III's requirement that federal courts only review cases pursued by litigants who are likely to suffer concrete, particular, and imminent harm. Thus, "[i]t cannot be that, by . . . participating in the suit, [parties] . . . retroactively created a redressability (and hence a jurisdiction) that did not exist at the outset." *Lujan*, 504 U.S. at 569 n.4; *see also Perry v. Village of Arlington Heights*, 186 F.3d 826, 830 (7th Cir. 1999) ("It is not enough for [a litigant] to attempt to satisfy the requirements of standing as the case progresses.").

Standing "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts for the first time." *Hollingsworth*, 133 S. Ct. at 2661. Thus, Appellants must establish standing as of the moment they pursued this case, i.e., either when they first intervened or, at the latest, when they filed their initial notice of appeal. At either point, the question of whose district might be affected by an adverse judgment and how was far from concrete or imminent.[4]

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[4] To the extent Appellants try to bootstrap off of the remedial plan, it is notable that nine out of ten Appellants lack standing even under their own "electoral harm" theory, Appellants' Br. 63. Cantor and Wolf are *former* congressmen who do not reside in CD3. The remedial plan makes no changes to the boundaries of CD5 (Hurt), CD6 (Goodlatte), CD9 (Griffith), or CD10 (Comstock) and Appellants assert no meaningful changes to the partisan

In any event, Appellants fail to establish that they have a *"legally protected* interest" (whether as representatives of districts other than CD3, or as "Republican voters") in avoiding diminution of electoral prospects that establishes standing. *Lujan*, 504 U.S. at 560 (emphasis added). Taken to its logical (and untenable) conclusion, Appellants' argument would confer upon members of Congress, former members of Congress, and voters in general *a legally cognizable interest* in maintaining the *precise* partisan composition of the voters in the districts that they represent or live in.

This Court has never recognized a legal right following from such a broad and diffuse injury, and for good reason. Under this theory, a Congressman would have standing to challenge or defend virtually any law that caused even a miniscule number of voters who have previously supported him to move *from* his district—or, alternatively, caused voters from the other party to move *into* his district—on the theory that it reduced his partisan vote share and was "likely" to cause him injury by threatening his seat (or, in the case of a "Republican voter," his partisan interest in a Republican holding that seat). Thus, one could imagine a member of a party that enjoys disproportionate support among university communities filing suit to challenge the reduction of funding to a university in her district on the ground that the likely

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composition of CD1 (Wittman) and CD7 (Brat), *see generally* Application for Stay of Remedial Plan. Rigell, who represents CD2, also faces no injury, as he is not running for reelection. *See* Rachel Weiner, *Rep. Scott Rigell retiring in 2017*, Wash. Post, Jan. 14, 2016, https://www.washingtonpost.com/local/virginia-politics/rep-scott-rigell-of-virginia-says-he-wont-run-for-reelection/2016/01/14/252e3960-baf8-11e5-99f3-184bc379b12d_story.html.

result would be that her partisan vote share in the district would be reduced. But this is the very definition of an attenuated harm, which in any other context would plainly not be "fairly traceable" to the conduct at issue to support standing.

And the harm that Appellants assert is even further afield—they are not the members who represent the district in which the university is housed, they are the members who represent the *surrounding* districts, and who would claim standing based on their fear that cutting the university's funding will displace voters that have supported their *opponents* into surrounding districts. That such a result would be indisputably absurd exposes the fatal flaws in Appellants' position.

If Appellants are not claiming a legally cognizable interest in maintaining precisely the same partisan balance in the districts that they represent, then their standing must be based on an assumption that only changes resulting in a "majority-Democratic district" are likely to actually harm their chances for reelection. Appellants' Br. 57. But this alleged harm is also fundamentally flawed.

As a preliminary matter, it assumes that maintaining a majority partisan voter share in a district that one represents or lives in is a legally cognizable injury—and Appellants have been conspicuously unable to identify a single case so holding. Moreover, this theory of standing would be impossible for courts to apply in practice. Faced with intervention at the outset of a case, the district court would need to attempt to determine how drastic the alleged racial gerrymander may be found on the merits, how that gerrymander would likely be remedied, and whether that theoretical remedy would theoretically result in changing the majority partisan

voter share of one or more other districts. This is utterly unworkable.

More importantly, it assumes that the Appellants who are current members of Congress are not likely to lose an election if their districts remain as is. Appellant Cantor's own experience (losing a primary election to Appellant Brat in 2014) illustrates that this is not the case: politicians lose elections all of the time for all kinds of reasons.

Even assuming that such an injury is theoretically cognizable, it cannot support standing here because it is so highly speculative. Several things must happen before the asserted "injury" (an Appellant losing reelection because of the remedial plan) could come to pass: First, an Appellant has to win a primary election. Then, the Appellant has to lose in the general election to a Democrat *and* be able to demonstrate that the loss was due, not to the independent, ever-shifting nature of the electorate, or even to scandals or other failings of the Appellant's own making, but to the District Court's adoption of a map that tipped the election by swapping a dispositive number of Democrats for Republicans in the Appellant's district. Appellants are highly unlikely to *ever* be able to make that showing and certainly have not done so on the record here.[5]

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[5] Indeed, the speculative nature of Appellants' theory is now on full display. In their original briefing on standing, Appellants asserted that "[a]ll eight Appellants currently serving in Congress intend to seek reelection in 2016," Appellants' Br. Re: Standing (Oct. 13, 2015) 4. But thereafter, Rigell decided *not* to run for re-election. The "injury" he claimed in invoking this Court's jurisdiction will never come to pass. Politicians constantly adapt to changing political circumstances to best secure their chance at victory, for instance, by running for reelection in a different district, as Appellant Forbes is considering. *See, e.g.*,

Thus, even if Appellants' worst fears were to come true, and one or more Appellant lost reelection, an argument that the loss resulted from changes made to remediate a racial gerrymander in CD3 would be tenuous at best. *See Clapper*, 133 S. Ct. at 1150 (refusing to "endorse standing theories that rest on speculation about the decisions of independent actors").

Appellants' reliance on *Meese v. Keene*, 481 U.S. 465 (1987), moreover, does not support their claim to standing based on a potential harm to one's reelection prospects. *Meese* was a First Amendment case, and the reputational injury that the Court found supported the appellee's standing was of a sort long recognized as legally cognizable. *See id.* at 475-76. Nowhere does *Meese* hold that appellee's assertion that he faced injury to his reelection chances, which was part and parcel of the claimed reputational harm, constituted an independent and sufficient basis for standing. *Id.* at 476 ("[E]njoining the application of the words 'political propaganda' to the films would . . . redress the [asserted] *reputational* injury.") (emphasis added).

Appellants cite a laundry list of cases to assert that their alleged injury is "identical to or even more substantial than" other injuries that have conferred standing in the electoral context. Appellants' Br. 58-59. But in each of these cases, unlike here, the litigant had a direct stake in the outcome of the case.[6] That

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Respondents' Opposition to Stay Application (Jan. 21, 2016) 28-29. The fluidity of any one incumbent's electoral ambitions and prospects exemplifies the speculative nature of Appellants' standing theory.

[6] *See Davis v. Fed. Election Comm'n*, 554 U.S. 724 (2008) (self-financed candidate had standing to challenge campaign finance requirement where a ruling of unconstitutionality would have

candidates have standing in different electoral contexts is of no moment here.[7]

In sum, Article III's case and controversy requirement guards against precisely what Appellants are attempting to do here—hijack litigation that the Defendants no longer wish to defend and obtain this Court's review based entirely on harms that may never come to pass.

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prevented the FEC from requiring additional disclosures and bringing enforcement action against him for prior violations); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 19 (1998) (respondent voters had standing under Federal Election Campaign Act to challenge FEC's dismissal of administrative complaint because statute specifically provided for redressability and their injury was of the kind that the statute was designed to address); *Clements v. Fashing*, 457 U.S. 957, 962 (1982) (officeholder appellees had standing to challenge resign-to-run provision because provision was a "but-for" cause of their decision not to run for affected office rather than a "speculative or hypothetical" obstacle); *Storer v. Brown*, 415 U.S. 724, 738 n.9 (1974) (candidates had standing to challenge validity of ballot access signature requirements, because without signatures candidates could not appear on ballot).

[7] Appellants further argue that actions threatening one's current occupation constitute direct injury, but the case they cite contemplates an actual loss of current employment rather than ambiguous changes to the industry as a whole. *See Clements*, 457 U.S. at 962 (challenged provision required automatic resignation from current position if officeholders declared candidacy for another elected position). Their other two cited cases, moreover, pertain only to the specific context of Title VII violations. *See Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763-66 (1976); *Martin v. Wilks*, 490 U.S. 755 (1989). Indeed, this Court has rejected the notion that anyone asserting a "professional interest" in the outcome of a case would have standing. *Lujan*, 504 U.S. at 565.

II. THE DISTRICT COURT PROPERLY FOUND THAT RACE PREDOMINATED IN CD3

Appellants fare no better on the merits. Their persistent efforts to rewrite the factual record only reinforce that this appeal is premised on "post-hoc political justifications for the 2012 Plan," J.S. App. 33a, advanced by self-described "strangers to the redistricting process," Appellants' Br. 46 n.4.

Appellants' entire argument flows from their fundamental disagreement with the District Court's factual finding that race predominated in drawing CD3. Appellants repeatedly insist that politics, and not race, was the driving force behind CD3. Toward that end, Appellants contend that Delegate Janis—the chief mapdrawer—did not mean what he said when he announced that the racial composition of CD3 was his "paramount concern" and disavowed any consideration of partisan performance, *id.* at 38, 43, that Appellees' expert was not credible, *id.* at 46, and that the 55% BVAP threshold did not exist, *id.* at 44.

But the Court reviews these findings "only for 'clear error,'" *Cromartie II*, 532 U.S. at 242; *see also Miller*, 515 U.S. at 917. Thus, even if the Court "would have decided the case differently," it may reverse the District Court's finding on racial predominance only if "on the entire evidence, it is left with the definite and firm conviction that a mistake has been committed." *Cromartie II*, 532 U.S. at 242 (citations omitted). Here, the finding that race predominated is not only supported by the record—it is compelled by it.

A. Senate Criteria

Before embarking on the redistricting process, the Senate Committee on Privileges and Elections adopted official redistricting criteria ("Senate Criteria"), touted below by Appellants as "a preexisting framework against which to judge the Enacted Plan." Dkt. No. 85 (Int.-Def. Tr. Br. 18). The second criterion after "Population Equality" is avowedly racial. Titled "Voting Rights Act," it requires that "[d]istricts shall be drawn" to avoid "the unwarranted retrogression or dilution of racial or ethnic minority voting strength." JA 97. It was further decreed that this factor "shall be given priority in the event of conflict among the criteria." JA 99.

The predominance inquiry asks whether "the legislature 'placed' race 'above traditional districting considerations.'" *Alabama*, 135 S. Ct. at 1271 (citation omitted). That is precisely what the Senate Criteria do. Indeed, these criteria are virtually indistinguishable from the redistricting guidelines adopted in *Alabama*, which also listed "compliance with . . . the Voting Rights Act" as the second most-important criterion after population equality. *Id.* at 1263.

Appellants make little mention of this document, viewing the primacy of VRA compliance as a "truism" that stems from the Supremacy Clause. *See* Appellants' Br. 16. But, as in *Alabama*, the General Assembly's prioritization of VRA compliance is illuminating because of the *means* the General Assembly used to apply this overriding criterion. *See Alabama*, 135 S. Ct. at 1263 ("Specifically, Alabama believed that, to avoid retrogression under § 5, it was required to maintain roughly the same black population percentage in existing majority-minority

districts."). Here, as found by the District Court and discussed below, the General Assembly attempted to achieve non-retrogression under Section 5 by using a "mechanical racial target[]." *Id.* at 1267. And, as in *Alabama*, the General Assembly's "express[] adopt[ion] and appli[cation] [of] a policy of prioritizing" this target "above all other districting criteria (save one-person, one-vote) provides evidence that race motivated the drawing of" CD3. *Id.*

B. Delegate Janis's Statements

The repeated statements of the Plan's sole author regarding his methodology for drawing district lines leave little doubt that CD3 was driven, first and foremost, by race.[8] In his opening pronouncement about the Plan on the House floor, Delegate Janis confirmed that he applied the redistricting criteria as rank-ordered in the Senate Criteria, explaining that the two most important criteria he employed were adhering to the "one-person-one-vote rule" and ensuring that "there be no retrogression in minority voter influence" in CD3. JA 351.

And there is more. Delegate Janis went on to declare that "one [of] the *paramount concerns* in . . . drafting . . . was the constitutional and federal law mandate under the [VRA] that we not retrogress minority voting influence in [CD3]." JA 357 (emphasis added). He emphasized that he "was *most especially focused* on making sure that [CD3] did not retrogress

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[8] Appellants do not dispute that Delegate Janis was the Plan's sole author and the most knowledgeable about its purpose. The record makes these facts clear. *See, e.g.*, JA 361, 430. Accordingly, Delegate Janis's explanation of its purpose provides uniquely persuasive evidence that race predominated in drawing CD3.

in its minority voting influence," JA 361 (emphasis added); that "the *primary focus* of how the lines . . . were drawn was to ensure that there be no retrogression [of black voters] in [CD3]," JA 370 (emphasis added); and that he considered this factor "nonnegotiable," *id.*

And there is still more. Delegate Janis explained *how* he achieved this "paramount" criterion of non-retrogression. He simply "looked at the census data" to determine the BVAP of the existing CD3 and "ensure[d] that the new lines . . . would not retrogress in the sense that they would not have less percentage of [BVAP] under the proposed lines . . . than exist under the current lines." JA 357; *see also* JA 362 ("[T]he lines were drawn based on the Census Bureau data, which provides what the [BVAP] under the current district boundaries would be[.]"); JA 119-20 ("So mindful that the voting rights act requires us not to retrogress that district, . . . we can have no less than [the BVAP] percentages that we have under the existing lines[.]"). Delegate Janis further expressed his belief that ratcheting up the BVAP above 55% would provide "certainty" of DOJ preclearance. JA 398. In sum, Delegate Janis repeatedly stated that his goal was to achieve a certain racial composition for CD3 and that he ensured that result by looking solely at racial data.

These are precisely the kinds of statements that the Court concluded in *Alabama* were "strong, perhaps overwhelming, evidence that race did predominate." *Alabama*, 135 S. Ct. at 1271 (describing how "[t]he legislators in charge of creating the redistricting plan believed . . . that a primary redistricting goal was to maintain existing racial percentages in each majority-minority district, insofar as feasible").

In *Shaw v. Hunt* (*Shaw II*), the Court "fail[ed] to see how the District Court could have reached any conclusion other than that race was the predominant factor" based largely on strikingly similar statements. 517 U.S. 899, 906 (1996) (quoting *Miller*, 515 U.S. at 918). North Carolina's Section 5 submission stated that the plan's "*overriding purpose* was to comply with the dictates of the Attorney General[] and to create two congressional districts with effective black voting majorities." *Id.* "This admission was confirmed by the plan's principal draftsman, who testified that creating two majority-black districts was the 'principal reason' for Districts 1 and 12." *Id.* That the plan was driven by the perceived need to comply with the VRA did not mitigate the Court's conclusion that race was the predominant factor. *Id.* at 904-05 (laws classifying citizens primarily on the basis of race are constitutionally suspect, "whether or not the reason for the racial classification is benign [or] the purpose [is] remedial"); *Miller*, 515 U.S. at 918 (race was predominant purpose where "the General Assembly was driven by its overriding desire to comply with [DOJ's] maximization demands").

In *Bush*, the Court relied on similar "substantial direct evidence of the legislature's racial motivations." 517 U.S. at 960. First, Texas's Section 5 submission stated that certain congressional districts "'should be configured in such a way as to allow minorities to elect Congressional representatives.'" *Id.* (citation omitted). Second, the litigants conceded that the districts "'were created for the purpose of enhancing the opportunity of minority voters to elect minority representatives.'" *Id.* at 961 (citation omitted). Finally, legislators testified that the decision to draw majority-minority districts "was made at the outset of the

process and never seriously questioned." *Id.* In those cases, as here, race predominated.

Appellants' attempt to distinguish these cases only reinforces the inexorable conclusion that race predominated. According to Appellants, "Delegate Janis's [s]tatements [d]o [n]ot [s]how [r]acial [p]redominance" because they merely reflect a "routine and correct recitation of th[e] federal non-retrogression command." Appellants' Br. 43. Under this view, any analogy to *Shaw II* is "clearly off-base" as that case "reflected an *inaccurate* construction of the VRA (because it interpreted Section 5's *non-retrogression* command as requiring *additional* minority districts)." *Id.* at 43 n.3. But this argument only proves Appellees' point: Appellants concede that the *manner* of achieving the "paramount" objective of VRA compliance is determinative in evaluating whether race predominated. And in fact, Delegate Janis's strictly numerical interpretation of retrogression precisely "reflect[s] [the] inaccurate construction of the VRA," condemned in *Alabama*, 135 S. Ct. at 1271, 1273 ("Alabama's mechanical interpretation of § 5 can raise serious constitutional concerns."). In short, Delegate Janis's application of VRA principles is, contrary to Appellants, anything but "routine and correct."[9]

To overcome this core logical inconsistency in their argument, Appellants resort to denying altogether that Delegate Janis ever mentioned achieving a

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[9] While Appellees contend that Delegate Janis's efforts to comply with the VRA were misguided, they do not doubt his good faith regarding his stated goals. *See Smith v. Beasley*, 946 F. Supp. 1174, 1208 (D.S.C. 1996) ("[T]he good faith of the legislature does not excuse or cure the constitutional violation of separating voters according to race.").

particular racial composition in CD3, asserting that he "simply repeated the Section 5 truism" that retrogression is prohibited and "never said" this entails "maintain[ing] at least as large a percentage" of BVAP as under the Benchmark Plan. Appellants' Br. 44-45. Remarkably, on the very same page, Appellants quote Delegate Janis's statement that retrogression means "'[w]e can have no less' BVAP 'percentage of African-American voters than percentages that we have under the existing lines.'" *Id.* at 45 n.4 (quoting J.S. App. 22a and citing JA 119-20, 357).

At bottom, Delegate Janis's comments confirm that avoiding retrogression was his principal motivation in drawing CD3 and the way he achieved this prime directive was through a numerical racial target. Accordingly, "[r]ace was the criterion that," in Delegate Janis's view, "could not be compromised," and all other considerations "came into play only after the race-based decision had been made." *Shaw II*, 517 U.S. 907

And, remarkably, there is yet more. Delegate Janis not only openly declared that he prioritized race and explained how he accomplished his racial goal, he also expressly disavowed any consideration of partisan performance. When asked whether he had "any knowledge as to how this plan improves the partisan performance of those incumbents in their own district[s]," Delegate Janis answered unequivocally: "I haven't looked at the partisan performance. It was not one of the factors that I considered in the drawing of the district." JA 456.

The District Court found it "appropriate to accept the explanation of the legislation's author as to its purpose." J.S. App. 23a. Appellants do not, suggesting

the Court ignore these statements as mere platitudes. But these "'explicit and repeated admissions' of the predominance of race . . . made in the course of hearings on the House of Delegates floor," J.S. App. 36a (citation omitted), are not so easily dismissed. *See Bush*, 517 U.S. at 970 (crediting the district court's reliance on "the State's own statements indicating the importance of race"). In short, where the sole mapdrawer expressly declares that race predominated, the District Court did not commit clear error in finding that race predominated.

C. BVAP Threshold

In addition to Delegate Janis's repeated statements that racial considerations predominated above all others, the District Court found it highly persuasive that the General Assembly used a "[r]acial [t]hreshold [a]s the [m]eans to [a]chieve Section 5 [c]ompliance," J.S. App. 20a. And for good reason: The use of a mechanical racial threshold in *Alabama* was the lynchpin in this Court's conclusion that the record there presented "strong, perhaps overwhelming, evidence that race did predominate." 135 S. Ct. at 1271.

The District Court had good reason to conclude that the General Assembly applied a racial threshold in creating CD3: *Appellants' own expert* testified that the General Assembly adopted a 55% BVAP floor in an attempt to obtain Section 5 preclearance. J.S. App. 20a. Mr. Morgan, a consultant who assisted in drawing the 2011 House of Delegates Plan, JA 817, wrote that the General Assembly "found [the 55% BVAP floor] appropriate to comply with Section 5 for House [majority-minority] Districts" and "obtain Section 5 preclearance, even if it meant raising the

Black VAP above the levels in the benchmark plan." JA 518. According to Mr. Morgan, the General Assembly then "acted in accordance with that view for the congressional districts and adopted the Enacted Plan with the [CD3] Black VAP at 56.3%." *Id.*

Mr. Morgan's statements were corroborated by the legislative record. Indeed, when Delegate Janis was questioned whether he had "any empirical evidence whatsoever that 55 percent African-American voting population is different than 51 percent or 50," or whether the 55% threshold was "just a number that has been pulled out of the air," Delegate Janis justified the use of a 55% BVAP floor as "weighing a certainty against an uncertainty." JA 397-98.[10] Other members of the General Assembly also sought to justify CD3—albeit incorrectly—on the grounds that a 55% BVAP floor was necessary to comply with Section 5. *See, e.g.*, JA 533 ("[W]hen it came to Section 5— . . . we believed that that was not really a question that was subject to any debate. The lowest amount of African Americans in any district that has ever been precleared by [DOJ] is 55.0."); JA 527.

Moreover, Virginia's Section 5 submission consistently uses a 55% BVAP threshold to explain the Plan's impact on racial minorities. Describing the BVAP increase in CD3, the submission states that "both total and voting age populations are increased to over 55 percent." JA 77. It repeats this threshold number *three more times*, once for each of the legislature's other proposed plans. JA 78-80.

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[10] As set forth above, Delegate Janis made clear his belief that any drop in BVAP would constitute retrogression. *See, e.g.*, JA 119-20, 357. Here, he further indicates that meeting or exceeding 55% BVAP would make preclearance a "certainty."

Appellants now argue there was no racial threshold, Appellants' Br. 44, and are quick to dismiss the findings of their own expert as ill-informed, *see id.* at 45 (noting that "[i]f Mr. Morgan had said this," it would be irrelevant since he had no direct knowledge of the General Assembly's goals). But Appellants not only affirmatively offered Mr. Morgan's testimony into evidence, they whole-heartedly *embraced* these legislative facts and Mr. Morgan's conclusions in the District Court. Appellants quoted the legislative record showing that delegates demanded a 55% threshold. Dkt. No. 85 (Int.-Def. Tr. Br. 25-26) (Delegate Dance "advocated a 55% minimum BVAP for majority-black districts," stating in a public hearing "'at least 55 percent performing' was necessary to preserve black voters' ability to elect in House districts") (quoting JA 527). They defended the General Assembly's use of a racial quota, both before and after trial, as justified under Section 5. *See id.* at 26 (arguing "the General Assembly had 'a strong basis in evidence' to believe that Section 5 prohibited reducing [CD3's] BVAP below the benchmark level, and that 55% BVAP was a reasonable level for preserving the ability to elect," and it "acted accordingly when it adopted the Enacted Plan with 56.3% BVAP in [CD3]"); Dkt. No. 106 (Int.-Def. Post-Tr. Br. 32) (arguing that "[t]he General Assembly . . . had evidence that 55% BVAP was a reasonable threshold for obtaining . . . Section 5 preclearance").

Of course, in the wake of *Alabama*'s unequivocal rejection of mechanical racial thresholds, it is no surprise Appellants have abandoned their previous endorsement of the 55% BVAP floor.[11] But Appellants'

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[11] Though even now, Appellants cite the application of a 55% BVAP floor in the House of Delegates Plan as a "very good

efforts to bury the damning evidence they themselves advanced cannot undo the strong foundation undergirding the District Court's finding that the General Assembly's insistence on a predetermined racial threshold predominated over traditional districting principles.

D. Traditional Districting Principles

As set out above, this was a direct evidence case. There is no need to look to circumstantial evidence to confirm what Delegate Janis stated expressly about his predominant racial motives. *See Miller*, 515 U.S. at 916 ("The plaintiff's burden is to show, *either* through circumstantial evidence of a district's shape and demographics *or* more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.") (emphasis added). Nonetheless, the circumstantial evidence of CD3's "shape and demographics" fully supports the conclusion that the General Assembly subordinated traditional redistricting criteria, such as compactness, contiguity, and respect for political subdivisions, to racial considerations in crafting CD3.

1. CD3 Deviates from Traditional Districting Principles

The focus on race is evident in CD3's shape. "[R]eapportionment is one area in which appearances do matter," *Shaw v. Reno*, 509 U.S. 630, 647 (1993) ("*Shaw I*") and a district's "bizarre" or "irregular"

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reason[] to believe that this level of BVAP . . . was proper under Section 5" for purposes of CD3. Appellants' Br. 54-55.

shape provides circumstantial evidence that racial considerations predominated, *see Miller*, 515 U.S. at 914. Districts that connect disparate communities by narrowly complying with contiguity requirements are often probative of a racial purpose. *See id.* at 917 (race predominated where narrow land bridges connected areas with high concentrations of black residents); *Shaw II*, 517 U.S. at 903, 905-06 (same where district snaked along freeway collecting areas with black residents); *Moon*, 952 F. Supp. at 1147 (same in predecessor CD3 that had similarly bizarre shape).

By every measure used in Virginia's Section 5 submission, CD3 is Virginia's least compact district. JA 59, 195-96, 850. This is no surprise given Delegate Janis's admission that he did not consider compactness when drawing CD3. JA 125.

CD3 also stretches the limits of contiguity, using the James River to hopscotch white communities and scoop in black enclaves. Although the District Court found CD3 "legally contiguous" because Virginia law allows waterways to connect parts of districts, it recognized that CD3's tenuous use of water contiguity to "bypass white communities and connect predominantly African-American populations . . . contributes to the overall conclusion that the district's boundaries were drawn with a focus on race." J.S. App. 25a-26a. Adherence to the letter of the law is immaterial where manipulation of the contiguity requirement furthers race-based goals.

CD3 also splits more counties and cities—nine splits in all—than any other district and contributes to most of the splits of its neighboring districts. The district with the second-highest number is CD1, with only five splits, two of which are due to CD1's boundary with CD3. JA 198-99, 605-07. CD3 also splits more voting

tabulation districts (VTDs) than any other district. JA 607. The Plan splits 20 VTDs in all, of which CD3 participates in 14. JA 201. The General Assembly used these splits "strategically" as a means of bypassing white population centers to sweep more black communities into CD3. *See* J.S. App. 27a.

2. Appellants' Attempts to Explain Away These Deviations Fail

The facts above are undisputed. Instead, Appellants try to justify these objective flaws in CD3 in three ways.

First, Appellants contend that the District Court simply chose the wrong traditional principles. Appellants' Br. 50 (arguing the majority focused on "*other* traditional principles the Legislature prioritized *lower* than core preservation and incumbency protection"). But, inconvenient as they may be for Appellants, these objective factors were not hand-picked by the District Court. They are the hallmark "traditional race-neutral districting principles" specifically identified by *this* Court. *Miller*, 515 U.S. at 916 (listing "compactness, contiguity, and respect for political subdivisions"). Indeed, these are the very factors the Court evaluated in *Alabama*. *See* 135 S. Ct. at 1270.

Appellants' objection to "the majority's principles," Appellants' Br. 51, moreover, reveals the fundamental flaws in their preferred definition of "predominance." Appellants contend that "plaintiffs' threshold burden is to establish . . . a conflict" between race and traditional districting principles. *Id.* at 25. Stripped to its essence, Appellants ask the Court to hold, contrary to *Miller*, that "direct evidence going to legislative purpose" cannot alone establish racial predominance.

515 U.S. at 916. They cite no case for this "conflict" theory because there is none. Indeed, such a standard would overturn *Miller* by elevating "circumstantial evidence of a district's shape and demographics" to a threshold requirement. *Id.*

But Appellants' misconception of the law runs deeper. According to Appellants, it is not enough for plaintiffs to demonstrate a conflict between race and traditional districting criteria, as Appellees have done here. Rather, under their view, plaintiffs must demonstrate "violations" of any and every possible race-neutral explanation, even those offered by self-described "strangers to the redistricting process," Appellants' Br. 46 n.4. In other words, the racial explanation must cancel out all other districting criteria in order for race to predominate, transforming plaintiffs' burden from showing that race was the *predominant* factor to showing that race was the *only* factor.

That is not the law. Courts often find that race predominates even when a legislature considers and satisfies non-racial goals. *See, e.g.*, *Alabama*, 135 S. Ct. at 1263 (legislature "sought to achieve numerous traditional districting objectives," but "placed yet greater importance" on avoiding retrogression); *Shaw II*, 517 U.S. at 907 ("That the legislature addressed [other] interests does not . . . refute the fact that race was the legislature's predominant consideration."); *Bush*, 517 U.S. at 963 (race predominated even though "[s]everal factors other than race were at work," including an "unprecedented" focus on "incumbency protection"); *Clark v. Putnam Cty.*, 293 F.3d 1261, 1270 (11th Cir. 2002) ("Race may be shown to have predominated even if . . . factors other than race are shown to have played a significant role in the precise

location and shape of those districts.") (citation omitted); *Moon*, 952 F. Supp. at 1146-48 (race predominated where "the Legislature sought to protect and indeed enhance" the district's BVAP ratio, even while considering political partisanship, incumbent protection, and communities of interest); *see also* J.S. App. 32a n.23 ("[W]hen racial considerations predominated in the redistricting process, the mere coexistence of race-neutral redistricting factors does not cure the defect.").

Accordingly, Appellants' contention that "District 3 does not subordinate traditional districting principles" because it supposedly does not conflict with their preferred "neutral principles," Appellants' Br. 50, fails at every level. Delegate Janis's prioritization of race resulted in deviations from principles of compactness, contiguity, and respect for political subdivision boundaries, and thus had a "direct and significant impact" on the drawing of CD3, *Alabama*, 135 S. Ct. at 1271.

Second, Appellants contend that any deviations from compactness, contiguity, and respect for political subdivisions are of no moment, either because these principles are not that important or because the deviations are not that severe. Appellants' Br. 51-53. But while Appellants shrug at these traditional criteria, this Court has long held them in high regard for evaluating alleged racial gerrymanders. Indeed, Appellants' contention that compactness is "inherently manipulable" and therefore meaningless, Appellants' Br. 52, ignores both the Court's precedent, *Shaw I*, 509 U.S. at 647, and the requirements of the Virginia Constitution, Va. Const. art. II, § 6 ("Every electoral district shall be composed of contiguous and compact territory."). And the numerous locality splits

are especially probative where the mapdrawer extolled the virtues of avoiding them. *See, e.g.*, JA 352 ("Wherever possible, we also attempt to keep together jurisdictions and localities, counties, cities, and towns.").

It hardly matters, moreover, that CD3 is not as grossly non-compact as the original *Shaw* district, *see* Appellants' Br. 52, that water contiguity is technically "legal," *id.* at 53, or that Appellees' alternative plan may have had just one fewer locality split, *id.* at 50-51. [12] None of these factors is a stand-alone requirement racial gerrymandering plaintiffs must prove has been "violated" in order to prevail. Instead it is the series of "irregularities and inconsistencies with respect to the[se] traditional districting criteria" that helps further establish that race was the driving force behind district lines. J.S. App. 30a. The District Court would have been remiss to ignore the red flags raised by this circumstantial evidence, and its reliance on that evidence to bolster its conclusion that race predominated is certainly not clear error.

Third, Appellants contend that it was not *race* that subordinated "the majority's principles," but partisan considerations undertaken in the guise of core preservation. Appellants' Br. 51. But Appellants' refrain that core preservation explains away the

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[12] Appellants' repeated attempts to defend the racial gerrymander in CD3 by attacking Appellees' alternative plan, *see, e.g.*, Appellants' Br. 7-8, 49, 51-52, ignores one key fact: Appellees' alternative plan is not on trial. Appellees offered their alternative plan merely as evidence that some objective flaws in the Enacted Plan could have been avoided, *see* Appellees' Mot. to Dismiss or Affirm 29-30, not as a cure to the deep-seated racial gerrymander of CD3. The District Court relied on it for this limited purpose. J.S. App. 28a-29a.

overwhelming evidence of racial predominance rings hollow, as it turns a deaf ear to this Court's precedent, the legislative record, and the map itself.

As an initial matter, this Court has emphasized that core preservation "is not directly relevant to the origin of the *new* district inhabitants." *Alabama*, 135 S. Ct. at 1271. Indeed, as the District Court found (and Appellants do not dispute), the new inhabitants of CD 3 "were predominantly African-American." J.S. App. 30a.

Additionally, Appellants grossly inflate the role of core preservation in both the redistricting process and the resulting district. The allegedly "preferred" principle of core preservation appears nowhere in the Senate Criteria that Appellants believe provides "a preexisting 'framework' against which to judge the Enacted Plan." JA 97; Dkt. No. 85 (Int.-Defs. Tr. Br. 18). And when speaking on the House floor, Delegate Janis expressly rank-ordered core preservation "[t]hird" after population equality and non-retrogression. JA 352.

To the extent the General Assembly considered district cores, it did little to respect them. CD3 needed 63,976 additional residents to meet the ideal population, but instead of just adding people to the district, the General Assembly *removed* 58,782 residents. JA 608-09, 614. "Far from attempting to retain most of the Benchmark Plan's residents within the new district borders," J.S. App. 29a-30a, the General Assembly removed over 180,000 people from their existing districts simply to increase the population of CD3 by 63,976 people. JA 614. This massive dissection of district populations followed racial lines: "Tellingly, the populations moved out of the Third Congressional District were predominantly

white, while the populations moved into the District were predominantly African-American." J.S. App. 30a (citing JA 609). These large population swaps only demonstrate that, as promised, Delegate Janis's interest in core preservation gave way to his "nonnegotiable" effort to achieve a specific racial composition in CD3. JA 370.

Finally, even if core preservation were a primary concern in redrawing CD3, this hardly undermines CD3's racial purpose, as the "core" of CD3 is, historically, a racial gerrymander. In 1997, CD3 was struck down as an unconstitutional racial gerrymander. *Moon*, 952 F. Supp. 1141. As here, that historical district crisscrossed the James River to sweep in black communities. Although the General Assembly was thereafter instructed to craft a remedial plan, that plan was never challenged, let alone blessed by the court as "'conform[ing] to all requirements of law.'" Appellants' Br. 51 (quoting *Moon*, 952 F. Supp. at 1151). Still, Appellants contend that any flaws in CD3 "were all *inherited* from Benchmark District 3" and are therefore immune from judicial scrutiny. *Id.* at 50. But the lack of a judicial challenge to the Benchmark district hardly exonerates CD3. The mere passage of time cannot cure a racial gerrymander that may have persisted for decades.

In any event, even if Benchmark CD3 had received a judicial seal of approval, Enacted CD3 only exacerbates the district's problems in ways that echo the version deemed unconstitutional in *Moon*. For instance, while the 1997 remedial plan omitted the City of Petersburg from CD3, Enacted CD3 once gain engulfs that city, while further splitting the City of Norfolk. *See* JA 580-81. While the 1997 remedial plan

dropped the BVAP of CD3 from 61.17% to 50.47%, the BVAP of Enacted CD3 shot up to 56.3%. JA 427.

Indeed, Enacted CD3 can be described in strikingly similar terms to the district struck down in *Moon*. Like the *Moon* district, CD3 begins in the southeast corner in the "tidewater cities of Norfolk, Suffolk, and Portsmouth." 952 F. Supp. at 1144; *see also* JA 191-95; Int. Ex. 8. "It crosses the Chesapeake Bay to include portions of . . . Hampton and Newport News where the African–American population is the majority, using only the open water of the Chesapeake Bay and the James River to connect the disparate and non-contiguous portions of these two small cities. The District then crosses the James River into the largely rural Surry County, recrossing the James River to take in all of the African–American majority Charles City County." 952 F. Supp. at 1144; *see also* JA 191-94. "To the south the District runs through Prince George County" and "terminat[es] some 30 miles away in the City of Petersburg." 952 F. Supp. at 1144; *see also* JA 191-95; Int. Ex. 8. Both districts take in part of Henrico County "before reaching the more built up and heavily black eastern suburbs of Richmond." 952 F. Supp. at 1144; *see also* JA 191-94; Int. Ex. 8.

Thus, both the *Moon* district and the enacted district hopscotch repeatedly across the James River to slice apart cities along racial lines, connecting the tidewater area to the east with Richmond to the west. *See* J.S. App. 25a (CD3 "reflect[s] both an odd shape and a composition of a disparate chain of communities, predominantly African-American, loosely connected by the James River").[13] In short, the core of CD3 is

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[13] The District Court's remedial plan specifically unravels these aspects of the district. *See* Remedy Order 17.

itself an unconstitutional racial gerrymander. *Shaw* defines both its history and its legacy.

E. Racial Sorting of VTDs

The District Court was further persuaded that race predominated by evidence provided by Appellees' expert Dr. McDonald that, among the high-performing Democratic VTDs that could have been placed within CD3, the General Assembly chose to include those with significantly higher BVAPs. J.S. App. 30a; *see* JA 248, 616. Based on all of the evidence, Dr. McDonald concluded that race, and not politics, explains CD3.

Appellants launch a spate of attacks on Dr. McDonald's analysis, none of which undermines his fundamental conclusions. First, Appellants rely on their own expert's analysis to purportedly show that the VTD swaps among districts "had a political effect identical to their racial effect." Appellants' Br. 47. But the District Court found Appellants' expert not credible. *See* J.S. App. 21a n.16 (finding "significant" that Mr. Morgan "proffers no academic work, that he does not have an advanced degree, that his undergraduate degree was in history, that he has never taken a course in statistics, . . . and that he miscoded the entire city of Petersburg's VTDs"); *id.* at 34a n.25 (noting "Mr. Morgan's analysis was based upon several pieces of mistaken data, a critical error"). The District Court is in a unique position to make credibility determinations that, accordingly, "can virtually never be clear error." *Anderson v. City of Bessamer City*, 470 U.S. 564, 575 (1985).

Appellants next protest that Dr. McDonald examined VTDs "up to *thirty miles away*" from CD3's boundary. Appellants' Br. 48. But they ignore that the

General Assembly itself included far-flung VTDs when redrawing district boundaries. *See* JA 868-73.

Appellants further fault Dr. McDonald for "lump[ing] together all 55% and above Democratic VTDs" in his race versus party analysis, claiming this is akin to the expert analysis deemed insufficient in *Cromartie II*. Appellants' Br. 48. But the expert in *Cromartie II* based his analysis on precincts that "were at least *40%* reliably Democratic." 532 U.S. at 247. The Court found this cutoff inappropriate for distinguishing between racial and partisan differences. *Id.* Dr. McDonald's analysis, by contrast, examined the BVAP of only those VTDs that were over 55% Democratic, "which is above the accepted level political scientists consider to be competitive." JA 248.[14] Appellants cannot show that the District Court committed clear error by concluding that an overwhelming majority Democratic voter share provides a basis for measuring the relative racial and political impact of VTD swaps.

Even if the Court were to credit Appellants' analysis, all it establishes is that packing black residents into CD3 *also* helped Republicans. This reveals another fundamental flaw in Appellants' legal theory. Just because a districting plan benefits a certain group does not mean the plan was drawn primarily for that purpose. Indeed, Appellants' expert

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[14] *See, e.g.*, Gary C. Jacobson, *The Electoral Origins of Divided Government: Competition in U.S. House Elections, 1946-1988* 26 (1990) ("The two thresholds of marginality commonly found in the literature are 55% and 60% of the vote. Winning candidates who fall short of the threshold are considered to hold marginal seats; those who exceed it are considered safe from electoral threats.").

"conceded" that the Plan's impact was consistent with race as the predominant factor behind CD3. JA 834.

Ultimately, even if there is a correlation between race and politics, where the mapdrawer declares he looked only at race, and did not "look[] at" political performance, JA 456, the District Court's finding that the expert testimony supports its conclusion that race predominated is not "clear error."

III. APPELLANTS' ARGUMENT THAT POLITICS PREDOMINATED IS BASELESS

The mountain of evidence outlined above fully supports the District Court's finding that race predominated. Appellants cannot wish away the unequivocal statements of the Plan's sole author, claw back their own evidence of a 55% BVAP threshold, or set aside circumstantial evidence of shape and demographics demonstrating CD3's predominant racial purpose.

Nonetheless, Appellants insist that Delegate Janis's "overriding objective" was, in fact, to achieve a very specific partisan aim. Appellants' Br. 37. According to Appellants, Delegate Janis drew CD3, first and foremost, to "strengthen[] Republican districts" and entrench the "8-3 pro-Republican split." *Id.* at 5. But this purported mission is unsupported by the record. Moreover, even crediting Appellants' contention that partisan politics was Delegate Janis's ulterior motive all along, his express use of race to achieve his supposed partisan goals triggers strict scrutiny.

A. The Record Does Not Support Appellants' Factual Assertion that Politics Drove CD3

The District Court was unpersuaded by Appellants' repeated assertions that Delegate Janis's predominant purpose in drawing CD3 was to maintain an 8-3 Republican advantage statewide. J.S. App. 16a n.12, 30a-36a. And for good reason. This purported goal finds no support in the legislative record; it is never mentioned in the official redistricting guidelines, JA 97; Appellants offered no trial testimony from Delegate Janis or any other legislator to that effect; and Delegate Janis expressly declared: "I haven't looked at the partisan performance. It was not one of the factors that I considered." JA 456. Indeed, although Appellants refer to the "8-3" partisan divide no less than *eleven* times in their brief, Delegate Janis never once uses the term in describing his objectives.

Appellants point to the legislative record to contend that Delegate Janis's "overriding objective was 'to respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 election,' when voters elected 8 Republicans and 3 Democrats (as opposed to the 5-6 split resulting in 2008)." Appellants' Br. 37. The term "overriding objective" is Appellants' own creation and is not found in the legislative record. The record instead reveals that "respect[ing] . . . the will of the Virginia electorate" came "[t]hird" among Delegate Janis's redistricting considerations, after population equality and non-retrogression. JA 352; *see also* JA 365 ("[T]he third criteria that we tried to apply was, to the greatest degree possible, we tried to respect the will of the Virginia electorate as it was expressed in

the November 2010 congressional elections.").[15] To the extent this statement reflects a partisan motive, the fact that the Plan's author explicitly subordinated it to race definitively disproves that politics predominated the redistricting process.

Appellants' contention that "respect[ing] the will of the Virginia electorate" was code for maintaining the 8-3 partisan split is also not supported by the record. Delegate Janis stated plainly that "what [he] meant was we based the territory of each of these districts on the core of the existing congressional districts" in an attempt to make a "minimal amount of change or disruption to the current boundary lines." JA 352, 365. But as discussed above, *supra* pp. 36-37, the Plan's removal of over 180,000 people from their existing districts to increase the population of CD3 by 63,976 only demonstrates that, in accordance with his rank-ordering of priorities, Delegate Janis subordinated any interest in core preservation to his nonnegotiable effort to achieve a specific racial composition in CD3.

Extrapolating from Delegate Janis's statement that "[w]e respected the will of the electorate by not placing . . . two congressmen in a district together" and by not "draw[ing] a congressman out of his existing district," JA 365, Appellants contend that the map drawer

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[15] Appellants' argument on this point is confused. They first state that this goal was Delegate Janis's "overriding *discretionary* objective," Appellants' Br. 3, acknowledging that it came only "after the federal equal population and non-retrogression mandates," *id.* at 4. Later, however, Appellants boldly assert, without qualification, that this was Delegate Janis's "overriding objective." *Id.* at 37. While Appellants tout Delegate Janis's statement as "a display of candor rarely seen in redistricting," *id.*, their own distortions are all the more conspicuous.

sought to maintain and strengthen Republican advantage.[16] But Delegate Janis was precise in his statement of intent: although he sought to avoid pitting incumbents against one another, this goal was taken into account only after he established a certain racial composition in CD3. Taken together, Delegate Janis's statements support only one conclusion: partisan performance was disavowed as a factor altogether, and even if he avoided actively pairing or displacing incumbents, these goals were decidedly secondary to race.

Appellants search in vain for evidence outside the legislative record to advance their cause. First, Appellants inexplicably contend that *they*, self-described "strangers to the redistricting process," Appellants' Br. 46 n.4, "effectively drew their own districts." *Id.* at 39. This assertion contradicts Delegate Janis's testimony and Appellants' own assertions on the record. Delegate Janis clearly stated that he spoke with congressmen only to seek their input about communities of interest. JA 366 ("[W]e also tried not to split local communities of interest based on the recommendations we received from the current members of the congressional delegation."); *see also* JA 371, 452. Delegate Janis never even implied, much less stated, that congressmen drew their own districts.

Moreover, Delegate Janis considered "recommendations received from each of the 11 currently elected congressmen, both Republican and Democrat, about how best to preserve local communities of interest"

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[16] The remedial plan entered by the District Court also achieves these goals, Remedy Order 21, and Appellants hardly suggest that plan is a Republican gerrymander.

only *after* considering the "mandatory" criterion of non-retrogression. JA 365, 368.

Appellants' discovery responses confirm that their contributions to the Plan were minimal at best. The four congressmen who represented the districts surrounding CD3, and who would have benefitted most from packing black voters into CD3 under Appellants' theory, had almost no input. Wittman (CD1) never spoke to Delegate Janis about redistricting, attended only one meeting about redistricting, which Delegate Janis did not attend, and possessed no draft maps or redistricting-related communications. JA 338-43. Forbes (CD4) did not provide any feedback on the Enacted Plan, attended no meetings related to redistricting, and had no draft maps or communications with the General Assembly about redistricting. JA 303-08. Rigell (CD2) and Cantor (CD7) similarly attested that they had little to no input on the Enacted Plan. JA 297-302, 332-37. Appellants can hardly disclaim involvement during discovery and then proclaim usurpation of the redistricting process on appeal.

Second, Appellants rely extensively on the statements of "contemporaneous commentator[s]" to the redistricting process, Appellants' Br. 38, including an article written by Appellees' expert prior to his engagement in this case and statements by the Plan's opponents. Appellants cannot seriously argue that "commentaries" trump the unequivocal statements of the Plan's sole author. To find otherwise would suggest that the Court look to, for example, news stories "commenting" on legislation, instead of the legislative record, as evidence of legislative intent.

Indeed, the legislative record is replete with statements by the Plan's opponents decrying CD3's

predominant and unjustified use of race. Senator Locke, for instance, objected that CD3 "has been packed" with African Americans, leaving "those African-Americans living in the 1st, 2nd, and 4th congressional districts that abut the 3rd . . . essentially disenfranchised." JA 404. Senator McEachin similarly denounced the "packing" of African Americans in excess of "what is necessary to elect a candidate of choice," thereby "depriving minorities of their ability to influence elections elsewhere." JA 409. In short, Delegate Janis was not the only one who acknowledged the primacy of race; his colleagues openly recognized the race-based redistricting of CD3. The dispute was over whether the use of race was justified, not whether it occurred.

Appellants' final recourse is to a *deus ex machina* that would do away with this troublesome evidence altogether—their suggestion that courts must *assume* post hoc that any plan drawn by politicians was driven primarily by a political objective. *See* Appellants' Br. 28 (the "'assumption' that the Republican-controlled Legislature wanted to protect Republican incumbents is compelled by common sense"); *id.* at 38 (complaining the District Court's opinion implies that "for the first time in American history and for some wholly unexplained reason, a legislature did not want to re-elect congressional incumbents of the majority party"). Appellants cannot fathom that Delegate Janis would prioritize anything other than *their* political interests.

But Appellants' "assumption" is belied not only by Delegate Janis's statements, but also by this Court's recent decision in *Alabama*, which assumes no such thing, even though the *Alabama* district court found political explanations in the record evidence. *See Ala. Legis. Black Caucus v. Alabama*, 989 F. Supp. 2d 1227,

1289, 1294, 1301 (M.D. Ala. 2013) (noting the Legislature "considered partisan data to preserve the Republican supermajority in the Legislature," finding "statements by Republicans that they desired to gain seats with the new districts speak to partisan, not racial, motives," and criticizing dissent for "ignor[ing] the stronger evidence that partisanship explains what happened here").

At bottom, Appellants ask this Court to assume that no matter what politicians say to their constituents or in legislative session, their selfish pursuit of political power is always their *raison d'etre*. The Court should reject this profoundly cynical view. Delegate Janis could not have been clearer in his prioritization of race over all other criteria, including partisan politics. Appellants cannot establish that it was "clear error" for the District Court to take him at his word.

B. Use of Race as a Proxy for Partisan Goals Only Further Establishes Racial Predominance

Even if the Court believed Appellants' version of Delegate Janis's priorities—instead of Delegate Janis's—Appellants' contention that the General Assembly employed a BVAP floor as the means of achieving its supposed political ends hardly exonerates CD3. On the contrary, the General Assembly's use of race as a proxy for political goals would necessarily trigger strict scrutiny.

Appellants contend that the General Assembly's use of a racial threshold "could not violate *Shaw* because achieving that floor was the best . . . way to accomplish the Legislature's conceded partisan and incumbency protection objectives." Appellants' Br. 18. In other words, because "preserving District 3's . . . racial

percentage[]" served a partisan goal, any "misinterpretation" of Section 5 in adopting that racial percentage is irrelevant, as the district is immune from challenge. *Id.*

"But the fact that racial data were used in complex ways, and for multiple objectives, does not mean that race did not predominate over other considerations." *Bush*, 517 U.S. at 972. Rather, the General Assembly's "use of race . . . as a proxy to protect the political fortunes of adjacent incumbents" would only *confirm* that race was the predominant factor in drawing CD3. *Id.* at 972-73; *see also id.* at 997 (state may not "use race as a proxy to serve other interests") (Kennedy, J., concurring).

Thus, Appellants' contention that there can be no *Shaw* violation where race-based redistricting coincided with political objectives, *see, e.g.*, Appellants' Br. 24-25, 26, 27, 30, 39-40, is directly contradicted by this Court's precedent. A racial classification is no less suspect simply because it achieves a non-racial goal. Whenever a legislature chooses race as the tool to accomplish its objectives, "a racial stereotype requiring strict scrutiny is in operation." *Bush*, 517 U.S. at 968; *see also Clark*, 293 F.3d at 1271-72 ("Incumbency protection achieved by using race as a proxy is evidence of racial gerrymandering" and "indicative of the sort of racial stereotyping that the Supreme Court has condemned as resembling political apartheid").

Accordingly, it matters not whether race was used for its own sake or for some non-racial purpose. *See Bush*, 517 U.S. at 979 (race predominates where district was "racially motivated and/or achieved by the use of race as a proxy"). In either event, strict scrutiny is triggered. Appellants' suggestion that the partisan

ends justify the racial means only bolsters the District Court's finding of racial predominance.

IV. *CROMARTIE II*'S DISCUSSION OF CIRCUMSTANTIAL EVIDENCE IS INAPPOSITE

According to Appellants, the direct and circumstantial evidence outlined above simply makes no difference. No matter what the mapdrawer said he did, no matter the numerical racial threshold applied, no matter what the district actually looks like, under Appellants' view *Shaw* plaintiffs cannot prevail without an alternative map that "achieves the legislature's 'legitimate political objectives.'" Appellants' Br. 27 (citing *Cromartie II*, 532 U.S. at 258). Indeed Appellants would have the Court believe that *every* racial gerrymandering claim rises and falls on the plaintiffs' alternative plan. *See id.* at 41. But *Cromartie II* does not provide a get-out-of-jail-free card for racial gerrymanders.

In fact, *Cromartie II*, which examined the remedy to the original *Shaw* district, actually supports *Appellees*' position. In 1992, plaintiffs challenged North Carolina's Twelfth Congressional District, claiming the General Assembly had segregated voters into districts on the basis of race without compelling justification. In *Shaw I*, this Court held that the allegation stated a claim for relief. 509 U.S. at 658. The district was struck down on remand, and in *Shaw II*, the Court affirmed the finding of racial predominance and further held that the district failed to satisfy strict scrutiny. 517 U.S. 899.

The legislature then redrew the district "guided by two avowed goals: (1) curing the constitutional defects of the1992 Plan by assuring that race was not the

predominant factor in the new plan, and (2) drawing the plan to maintain the existing partisan balance in the State's congressional delegation." *Cromartie v. Hunt*, 133 F. Supp. 2d 407, 413 (E.D.N.C. 2000), *rev'd*, 532 U.S. 234 (2001). The end result was a district with a significantly lower BVAP, decreased number of county splits, and 41.6% of its previous area. *Hunt v. Cromartie*, 526 U.S. 541, 544 (1999) ("*Cromartie I*").

Plaintiffs challenged the new district as a racial gerrymander. *Id.* Unsurprisingly given the auspices of the new district, plaintiffs could muster "only circumstantial evidence in support of their claim." *Id.* at 547. The district court granted summary judgment in plaintiffs' favor "even though they presented no direct evidence of intent." *Id.* at 549. This Court reversed, noting that summary judgment is inappropriate where "[r]easonable inferences" from the circumstantial evidence "can be drawn in favor of a racial motivation finding or in favor of a political motivation finding." *Id.* at 552.

"On remand, the parties undertook additional discovery." *Cromartie II*, 532 U.S. at 239. The district court once again found in favor of plaintiffs, based primarily on circumstantial evidence of the district's shape and demographics, expert analysis of precincts, and two stray pieces of "direct" evidence: a legislator's "allu[sion] . . . to a need for 'racial and partisan' balance," and an email reporting that a senator had "moved Greensboro Black community into the 12th." *Id.* at 253-54 (citation omitted). This Court reversed, holding that, on the largely circumstantial record, the plaintiffs had "not successfully shown that race, rather than politics, predominantly accounts for" the resulting map. *Id.* at 257. While the Court found that the single email offered some "'direct' evidence" in

support of the lower court's conclusion, it found it considerably "less persuasive than the kinds of direct evidence we have found significant in other redistricting cases." *Id.* at 254 (citing statements from *Miller*, *Bush*, and *Shaw II* that states set out to draw majority-minority districts). That kind of direct evidence is discussed at length *supra* and is precisely the type of evidence upon which the District Court in this case relied.

Appellants distort both *Cromartie II*'s holding and its history in asserting that "'direct evidence' of a racial motive 'says little or nothing about whether race played a *predominant* role comparatively speaking.'" Appellants' Br. 39 (quoting *Cromartie II*, 532 U.S. at 253). This passage merely reflects that the specific, paltry "direct" evidence of racial predominance *in that case* was entirely unpersuasive. Indeed, there the legislative record plainly revealed an "avowed goal[]" to "assur[e] that race was *not* the predominant factor in the new plan." *Hunt*, 133 F. Supp. 2d at 413 (emphasis added).

Cromartie II concluded by stating that *"[i]n a case such as this one,"* plaintiffs "must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles." *Id.* at 258 (emphasis added). Appellants read far too much into this passage, suggesting that it renders moot the previous twenty pages of the opinion. But this approach applies where the legislature disavows racial motives and the Court must rely on circumstantial evidence to divine whether racial or political objectives truly drove redistricting. *See id.* at 242 (circumstantial evidence of racial population figures "will not, by itself, suffice to prove that a

jurisdiction was motivated by race in drawing district lines when the evidence also shows a high correlation between race and party preference") (quoting *Cromartie I*, 526 U.S. at 552). Where the *Cromartie II* plaintiffs presented little to no direct evidence that race was the predominant factor, the Court accordingly required an alternative plan as additional circumstantial proof.

Here, by contrast, Appellees presented unequivocal statements of the Plan's sole map drawer that race predominated over politics, together with a wealth of supporting evidence. Where the map drawer has unambiguously and expressly declared that achieving a certain racial composition in CD3 was prioritized over core preservation and incumbency protection, and *disavowed* consideration of political performance, no alternative map is required to retroactively disentangle racial and political motives. "Out right admissions of impermissible racial motivation are infrequent," but, as this case demonstrates, they do sometimes occur, and where they do, plaintiffs need not "rely upon other evidence." *Cromartie I*, 526 U.S. at 553. In light of the direct evidence available here, *Cromartie II*'s circumstantial evidence requirement does not apply.

Thus, contrary to Appellants' suggestion, *Cromartie II* most assuredly did not overturn this Court's well-established rule that racial gerrymandering plaintiffs may establish predominance "*either* through circumstantial evidence of a district's shape and demographics *or* more direct evidence going to legislative purpose." *Miller*, 515 U.S. at 916 (emphasis added); *see also Alabama*, 135 S. Ct. at 1267 (same); *Shaw II*, 517 U.S. at 905 (same); *Cromartie I*, 526 U.S. at 547 (same). A plaintiff need not provide any

circumstantial evidence, let alone a particular type of circumstantial evidence, in order to establish predominance where the direct evidence evinces an avowed racial purpose.

The District Court properly found as much, noting that compared to *Cromartie II*, which included "overwhelming evidence in the record 'articulat[ing] a legitimate political explanation for [the State's] districting decision,'" Appellants' "post-hoc political justifications for the 2012 Plan in their briefs" hardly stacked up against the abundance of direct and circumstantial evidence of race as the predominant purpose. J.S. App. 33a (quoting *Cromartie II*, 532 U.S. at 242).

Like *Cromartie II*, "[t]he issue in this case is evidentiary." 532 U.S. at 241. *Cromartie II* does not instruct courts to close their eyes to direct evidence of race-based redistricting for lack of an alternative plan.

V. THE DISTRICT COURT PROPERLY APPLIED STRICT SCRUTINY

Appellants' argument that the District Court misapplied the narrow tailoring requirement only demonstrates their own fundamental misunderstanding of the standard.

The District Court reconsidered and reaffirmed its opinion on narrow tailoring in light of *Alabama*.

> In *Alabama*, the Court made clear that Section 5 "does not require a covered jurisdiction to maintain a particular numerical minority percentage" in majority-minority districts. Rather, Section 5 requires legislatures to ask the following question: "To what extent must we preserve existing

> minority percentages in order to maintain the minority's present ability to elect its candidate of choice?" . . . . Specifically, the Court in *Alabama* noted that it would be inappropriate for a legislature to "rel[y] heavily upon a mechanically numerical view as to what counts as forbidden retrogression."

J.S. App. 39a (quoting *Alabama*, 135 S. Ct. at 1272-74). The District Court found that, as in *Alabama*, the General Assembly here "relied heavily on a mechanically numerical view as to what counts as forbidden retrogression" and that it lacked a "'strong basis in evidence' for doing so." *Id.* at 40a.

Indeed, the District Court could hardly hold otherwise in light of the record before it. There was no dispute below—and Appellants concede here, Appellants' Br. 56—that the General Assembly performed no analysis whatsoever of racial voting patterns to determine "'[t]o what extent [it] must preserve existing minority percentages in order to maintain the minority's present ability to elect its candidate of choice." J.S. App. 39a (quoting *Alabama*, 135 S. Ct. at 1274). Rather the *only* attempted means of compliance with Section 5 was a numerical racial target. As Delegate Janis explained, he believed that *reducing* the BVAP of CD3 would constitute retrogression and that *increasing* the BVAP above a 55% threshold would ensure preclearance. JA 357, 398.

But this "mechanically numerical view" *defied* all available evidence suggesting that preserving the minority's ability to elect its candidate of choice did not require maintaining the benchmark BVAP—let alone *increasing* it well above the 55% BVAP threshold. Congressman Scott, "a Democrat supported by the

majority of African-American voters," has long represented CD3 with overwhelming support. J.S. App. 40a. Under the reconfigured district, "he won by an even larger margin, receiving 81.3% of the vote." *Id.* The General Assembly essentially closed its eyes to the actual electoral history of the district in determining what was required by Section 5.

Appellants contend that the House of Delegates plan adopted a year earlier "with a 55% or higher BVAP in all majority-black districts" provided evidentiary support for the use of that threshold in CD3. Appellants' Br. 54-55.[17] But a myopic focus on this one plan fails to consider the *other* legislative plan adopted by the General Assembly and precleared by DOJ that same year, in which all five majority-minority Senate districts were below this threshold. JA 626-27; Int. Ex. 34 at 24. Indeed, DOJ had previously *twice* precleared CD3 with BVAPs lower than 55%. JA 580-83; Pl. Exs. 20, 22. This record provides no basis in evidence whatsoever for believing that Section 5—or even DOJ preclearance—required a 55% BVAP floor.

Appellants next construct a counterfactual world, hypothesizing about how DOJ would have responded if Virginia had decreased the BVAP of CD3 to less than 30%. Appellants' Br. 56. But this hypothetical falsely assumes that the only alternative to a baseless BVAP increase in a district that is already electing the minority's candidate of choice with overwhelming

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[17] Appellants do not suggest that the General Assembly even tried to examine the auspices of the 55% BVAP floor in the House of Delegates Plan, which was applied to twelve different districts in different parts of the state. That Plan, meanwhile, is also the subject of a racial gerrymandering challenge that is pending on a Jurisdictional Statement before this Court. *See Bethune-Hill v. Va. State Bd. of Elections*, No. 15-680 (docketed on Nov. 23, 2015).

support is a drastic decrease to the absolute minimum BVAP percentage that DOJ might deem acceptable in evaluating Section 5 compliance. As demonstrated by the District Court's remedial plan, however, a reasonable analysis of all relevant criteria results in a reasonable district that easily satisfies Section 5. *See* Remedy Order at 24-25.

Ultimately, Appellants' argument is that CD3's predominant use of race was narrowly tailored to the General Assembly's purported goal of protecting incumbents. *See* Appellants' Br. 56 (arguing that any reduction in BVAP "was *foreclosed* by the neutral objectives since it inherently endangered incumbents"). But that is simply not the standard. Strict scrutiny review inures only upon the predominant use of race in drawing district lines; Appellants cannot at this point rehash failed arguments that incumbency protection predominated. And Appellants bear the burden of demonstrating that the General Assembly had "*good reasons* to believe" that its "use [of a] racial threshold[]" was compelled by *Section 5*, not by its own political objectives. *Alabama*, 135 S. Ct. at 1274. Indeed, in arguing that Delegate Janis adopted a racial threshold to "directly further[]" his "incumbency-protection objective," Appellants' Br. 56, Appellants once again concede the use of race as a proxy for partisan goals, thereby triggering and failing strict scrutiny in one fell swoop.

Strict scrutiny is not, as Appellants would have it, an amorphous standard of review that allows the government to justify the use of race by invoking the VRA talismanically without analysis or evidence or by using race to achieve its other objectives. Because the General Assembly failed to "t[ake] any steps to

narrowly tailor" its use of race in drawing CD3, *Moon*, 952 F. Supp. at 1150, its predominant use of race cannot satisfy strict scrutiny.

CONCLUSION

Appellees respectfully submit that the appeal should be dismissed for lack of jurisdiction. In the alternative, the judgment of the District Court should be affirmed.

Respectfully submitted,

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